

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7049

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GEORGE M. OSSERMAN,

Plaintiff-Appellant,

-against-

BANK LEUMI TRUST COMPANY OF NEW YORK,

Defendant-Respondent.

-----X

APPELLANT'S REPLY BRIEF

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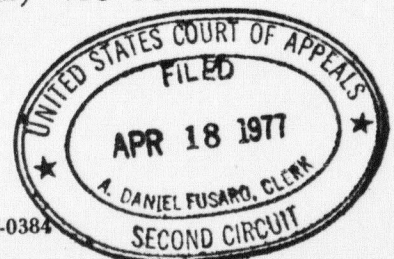


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In attempting to justify its position that it had a right to turn over plaintiff's Womig shares to Gloger, defendant has been unable to cite any case or authority that could in any way controvert the authorities cited by plaintiff in Point II of his brief, which show clearly that there is no such thing as an absolute right of subrogation, and that in this case Gloger had no right of subrogation.

Therefore, defendant's contention that Gloger had an absolute right of subrogation, which it was forced to recognize, is entirely erroneous in law and under the facts and circumstances of this case.

Defendant's position on the question of the exercise of care seems to be that a creditor exercises care when he turns guarantor A's collateral over to guarantor B, who pays the debt, after guarantor B has told the creditor "as soon as I get his collateral I will steal it". For that is exactly what Gloger said when he stated in writing to defendant (A-19) before paying off the loan that by doing it he would become the "sole owner" of plaintiff's shares.

It is the law in New York that a creditor may not without the consent of the surety release the collateral.

(Indiannapolis Morris Plan Corp. v. Karlin 28 N.Y. 2d 30,

35, 319 N.Y.S. 2d 831, 834-835, 268 N.E. 2d 632).

Here the creditor was specifically instructed by plaintiff's attorney not to release the collateral to anyone but the plaintiff (A-18). Here the defendant knew from the dissolution agreement which had been delivered to it by plaintiff (par. 6 of Complaint, A-9) that Gloger had no right to acquire plaintiff's shares unless defendant elected to foreclose and Gloger purchased the collateral for the amount sought on foreclosure (A-9, A-38). Here the defendant knew before it turned plaintiff's shares over to Gloger that Gloger intended to usurp ownership of them.

Not one case cited by defendant, and no theory of equity or justice supports the proposition that under such circumstances the defendant as creditor exercised due care. To the contrary it was guilty of gross negligence, if indeed an officer of defendant did not engage in a conspiracy with Gloger to enable him to usurp ownership of plaintiff's shares, covered up through the second letter of April 12th (A-20) apparently utilized as a means to give him the shares under a semblance of credibility in the transaction.

Because of defendant's reference to the action by plaintiff against Gloger in the United States District Court for

the District of Massachusetts, it is necessary to respond at length. In its footnote on page 8 of its brief, defendant refers to the ruling by Judge Skinner denying plaintiff's motion for partial summary judgment, and defendant concludes that because of such denial plaintiff is not entitled to recover against Gloger on the Womig shares and, therefore, has not been damaged by any act or omission by the defendant.

Judge Skinner held as follows:

"It is perfectly clear that there was no foreclosure of the Womig interests by the Bank and, consequently, no purchase after foreclosure by the defendant Gloger. The question is whether the terms of paragraph 15 of the dissolution agreement should be given sufficiently broad interpretation as to include the transaction above described. The principal purpose of the paragraph was to provide that the note to the First Israel Bank and Trust Co. be paid by Osserman, and that his failure to do so result in a serious penalty to him and a premium to Gloger for his undertaking of the payment of the debt."

Plaintiff has not yet appealed from this determination, because an appeal cannot be taken from an interim determination. Plaintiff shall appeal from it upon entry of final judgment after the trial of this case, which is now set for

June 1, 1977.

It is respectfully submitted that the decision of Judge Skinner is entirely erroneous, as appears from the following:

1. Judge Skinner interpolated words in the agreement that do not appear therein, by his statement that paragraph 15 was a penalty and premium provision. Not only is there nothing in paragraph 15 that so states or indicates, but the law of New York is clear that an agreement which prescribes a penalty is in violation of public policy and unenforceable.

City of Rye v. Public Service Mutual Insurance Company,
34 N.Y. 2d 470, 358 N.Y.S. 2d 391, 393 315 N.E. 2d 458.

Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199
N.Y. 479, 485, 93 N.E. 81.

Ward v. Hudson River Building Co., 125 N.Y. 230, 235,
26 N.E. 256.

2. No words or statement for a penalty and premium appear in paragraph 15, and cannot be read into it.

" *** since no such term appears, it cannot be supplied by the Courts under the guise of construction or interpretation, their power being limited to giving effect only to the

parties' expressed intent (citing many cases).

" *** We 'concern ourselves in what the parties intended, but only to the intent that they evidenced what they intended by what they wrote' Raleigh Associates v. Henry, 302 N.Y. 467, 473, 99 N.E. 2d 289, 291" (Wilson Sullivan Co. v. International Paper Makers, etc., 307 N.Y. 20, 25, 119 N.E. 2d 573 (Emphasis added)

3. The dissolution agreement was between two lawyers and the language used in paragraph 15 specified the only way that Gloger could possibly get ownership of plaintiff's Womig shares held as collateral by defendant, to wit, if defendant should "elect to foreclose", then Gloger was given the right to "purchase" all the collateral, including plaintiff's shares, for "the amount sought on said foreclosure". Defendant has conceded that it never elected to foreclose and that Gloger did not "purchase" the shares in foreclosure or otherwise.

4. The words "foreclose", "purchase" and "foreclosure" cannot be ignored under the guise of construing the paragraph in which they appeared, and Judge Skinner erred in ignoring them and interposing a provision for a penalty and premium.

(a) The words "foreclose" and "foreclosure" have a distinct, well-known meaning, and the remedy to foreclose on pledged personal property has long existed at common law and also under the Uniform Commercial Code and Lien Law.

54 N.Y. Jur., par. 272, pp. 42-43, and note 2

Lien Law, Sect. 206

Uniform Commercial Code, Sects. 9-102 (2), 9-501 (1) and 9-501 (5).

Goldfield Corp. v. General Host Corp., 29 N.Y. 2d 264, 273, 327 N.Y.S. 2d 330, 277 N.E. 2d 387.

As stated in Miller v. Weller (C.A. 3rd Cir.) 288 F.2d 438, 440, cert den. 368 U.S. 829:

"Where the meaning of a word is so generally recognized in the law and when in a contract the word is used, in an agreement which lawyers have drawn up and had their clients sign, we think that meaning for the word is to be applied in deciding what the obligations of the agreement are *** "
(Emphasis added)

And " *** When a man uses words which have a given legal effect he is bound by that effect ***" (Dura Electric Lamp Co. v. Westinghouse Electric Corp., C.A. 3rd Cir., 249 F.2d

5, 7, citing cases).

(b) The plain meaning of words employed in a contract must be given effect.

Levine v. Shell Oil Co., 28 N.Y. 2d 205, 211, 321 N.Y.S. 2d 81, 86, 269 N.E. 2d 799.

Laba v. Carey, 29 N.Y. 2d 302, 327 N.Y.S. 2d 613, 618, 277 N.E. 2d 641.

Clark v. American Morgan Co. (A.D. 1st Dept.) 268 A.D. 209, 49 N.Y.S. 2d 254, 256-257, leave to appeal denied 294 N.Y. 933.

(c) The language used in paragraph 15 did not say that, if plaintiff did not pay off the loan and Gloger did plaintiff would be penalized by Gloger thereby becoming owner of plaintiff's Womig shares. If that had been the purpose of the parties they simply could have so stated, they " *** could undoubtedly have found language fit for the purpose ** " (C.L. Holding Corp. v. Schutt Court Homes, A.D. 1st Dept., 280 A.D. 341, 113 N.Y.S. 2d 610, aff'd 307 N.Y. 648, 120 N.E. 2d 837, holding the word "meats" meant "meats" and not only certain types of meats). (Emphasis added)

"If that were indeed what the parties intended, the

language which they chose concealed most successfully that thought *** they could very easily, by the use of two or three words, have so provided. As a matter of fact, not only did they not so provide, but they actually and explicitly agreed *** otherwise (Raleigh Associates v. Henry, 302 N.Y. 467, 474, 99 N.E. 2d 289)." (Emphasis added).

(d) The words set forth in paragraph 15 of the dissolution agreement " *** are not to be ignored when seeking to arrive at the expressed intent *** " (River View Assoc. v. Sheraton Corp. of America, A.D. 1st Dept., 33 A.D. 2d 187, 306 N.Y.S. 2d 153, 156). (Emphasis added).

In Standard Oil Co. v. Ogden & Moffett Co. (C.A. 6th Cir.) 242 F.2d 287, 292, the Court said:

"Courts will not disregard the plain language of a contract or interpolate something not contained therein. The language used by the parties is clear and unambiguous and cannot be ignored, however plausible the reasons advanced. Henrietta Mills V. Commissioner of Internal Revenue, 4th Cir., 52 F.2d 931." (Emphasis added).

In Henrietta Mills v. Commissioner of Internal Revenue (C.A. 4th Cir.) 52 F. 2d 931, 934, the Court said:

" *** It is further contended on behalf of the petitioner that to give the contract any other interpretation would be illogical and utterly ridiculous from a business standpoint.

"We cannot agree with petitioner's contention. The courts will not disregard the plain language of a contract or interpolate something not contained in it. Here the language used by the parties is clear and unambiguous and cannot be ignored however plausible the reasons advanced. The courts will not write contracts for the parties to them nor construe them other than in accordance with the plain and literal meaning of the language used.(citing cases)" (Emphasis added).

(e) A court may not rewrite an agreement to supply a term not contained in it.

Wilson Sullivan Co. v. International Paper Makers, etc.,
supra, 307 N.Y. 20, 25 119 N.E. 2d 573.

Brown v. Manufacturers Trust Co., 278 N.Y. 317, 323-324,
16 N.E. 2d 350.

Under the guise of construction language may not be added " *** which the parties could have inserted, had they so desired *** " (Kushlin v. Bialer, A.D. 1st Dept., 32 A.D. 2d 217, 301 N.Y.S. 2d 181, 182, and cases cited). (Emphasis added).

" *** no other words can be added to or substituted for

those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language." (McConnell v. Pickering Lumber Corp., C.A. 9th Cir., 217 F.2d 44, 48).

(f) "No man who could read and understand English was entitled to accept a meaning and import of these words diametrically opposed to the text. A different rule applies to the illiterate ***" (Nadal v. Childs Securities Corp., A.D. 1st Dept., 18 A.D. 2d 375, 239 N.Y.S. 2d 959, 961). (Emphasis added).

(g) It is only the intent expressed in the agreement that is relevant. A court cannot devine an intent which is not expressed in the words used in the agreement.

Peripheral Equipment Inc. v. Farrington Mfg. Co., A.D. 1st Dept., 29 A.D. 2d 11, 285 N.Y.S. 2d 99, 101.

Brainard v. N.Y. Central Railroad Co., 242 N.Y. 125, 133, 151 N.E. 152.

State Bank of Albany v. Hickey, 29 A.D. 2d 993, 288 N.Y.S. 2d 980, 981, aff'd 23 N.Y.2d 910, 298 N.Y.S. 2d 312, 246 N.E. 2d 164.

As stated in Hotchkiss v. National City Bank of N.Y., 200 Fed 287, 292, Learned Hand, aff'd 2nd Cir., 201 Fed 664, aff'd 231 U.S. 50 (quoted and followed in Mencher v. Weiss, 306 N.Y. 1, 7-8, 144 N.E. 2d 177):

"A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, *** " (Emphasis added).

In view of the foregoing Judge Skinner's decision should be reversed on appeal, when it is taken.

Respectfully submitted,

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Copies Received

Date

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Firm

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